NO. 83-1533

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

PHILLIP WAYNE TOMLIN,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

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ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is a cause final for purposes of 28 U.S.C. 1257, where the proceedings in the state appellate courts are not yet complete?

2. Where a party is in nowise affected by a constitutional defect in a statute, is such a party denied due process by his receiving no benefit from the invalidation of the defect in the statute?

3. Where a party is convicted under a statute which unconstitutionally bars the jury from considering lesser included offenses, does such a party have the right to a new trial where (A) the evidence at trial affirmatively excluded lesser included offenses, (B) the party at trial neither offered nor presented any evidence of lesser included offenses,

(C) although invited by the trial judge at the sentencing hearing to present ".. anything he wishes to introduce in his behalf...", the party suggests no claim relating to lesser included offenses, (D) the party did not complain of the preclusion of lesser included offenses at trial nor on appeal until long after the cause was under review by the State Supreme Court, and (E) the party never suggests any specific, practical way that such preclusion affected his case?

THE PARTIES

The parties, in the Circuit Court of Mobile County, Alabama, the Court of Criminal Appeals and Supreme Court of Alabama, were and are Phillip Wayne Tomlin, who is Petitioner herein, and the State of Alabama, who is Respondent herein.

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The decisions and opinions of the Alabama appellate courts will not be reported until the state appellate litigation is complete, at which time they will be reported as follows:

Tomlin v. State, ____ So. 2d ____ (Cr. App. Ala., Nov. 20, 1979);

The same is submitted as Appendix "A" to this brief

Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Aug. 28, 1981);

The same is submitted as Appendix "B" to this brief.

Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Dec. 9, 1983);

The same is submitted as Appendix "C" to this brief.

JURISDICTION

The Petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alleged claim under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The Petitioner was convicted and sentenced under Section 13-11-2, Code of Alabama, 1975.

STATEMENT OF THE CASE

The Petitioner, Phillip Wayne Tomlin, was indicted by the Grand Jury of Mobile County, Alabama, for capital murder[1]; his plea was not guilty. (R. pp. 1 and 2)

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[1]Title 13, Section 13-11-2(a)(7) and (10), Code of Alabama, 1975.

On the trial of the case, the State's evidence showed without conflict that the Petitioner planned the killing of one Richard Brune for some nine (9) months, traveled from Houston, Texas to Mobile, Alabama, with a "hit man" to carry out the killing and shot and killed Richard Brune and Brune's date, Cheryl Moore, in cold blood. The Defense was alibi; the Petitioner presented evidence that he was in Houston, Texas, on the date and at the time of the killings. At no time before, during or after the trial, which resulted in the conviction and sentence of death, did the Petitioner ever claim or even suggest that his case was in anywise affected by the Preclusion Clause which barred the jury from considering lesser included offenses. (Trial Record as a whole)

At the sentencing hearing, the Learned Trial Judge went to considerable lengths to advise the Petitioner that the Court would hear whatever evidence the Petitioner wished to present in response to the State's evidence of aggravation or in possible mitigation of sentence. (R.P. 1003-1006) Typical is the following passage.

> "Mr. Atchison [Defense Counsel]: Of course, Your Honor, the people out in Texas and the ones living out there are not subject to our subpoena."
>
> "THE COURT: I understand that, but I've tried four of these cases and in one of them they had witnesses all the way from Chicago. The only thing I want everyone to know and to show for the record is if the Defendant wishes to have any of these people here before there's any final judgment in this case I will allow him that opportunity.

In other words, we're not sticking to any strict legal rules or what have you. Anything he wishes to introduce in his behalf the Court will listen to. Okay?" (R.P. 1005; emphasis supplied.)

However, the Petitioner neither offered nor presented any evidence relating to lesser included offenses nor did he raise any claim nor make any complaint relating to the Preclusion Clause at or after the sentencing hearing. (R.pp. 1006-1052)

Appeal was taken to the Court of Criminal Appeals of Alabama. On November 20, 1979, that Court affirmed the conviction but found the Trial Court's sentencing order defective in several respects. As to the sentencing order, the Court of Criminal Appeals wrote:

> "...[D]ue to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.
>
> "AFFIRMED IN PART; REMANDED WITH DIRECTIONS." (Tomlin v. State, ____ So. 2d ____, ____ [Cr. App. Ala., Nov. 20, 1979]; Appendix "A", page 44).

The Respondent State has never taken issue with the order of remandment. However, the order was stayed automatically when the Petitioner sought review in the Alabama Supreme Court and is yet stayed pending the instant proceedings. The order of remandment is still outstanding, and, therefore, the litigation in the Court of Criminal Appeals is not yet complete. Although numerous issues

were raised in the Petitioner's appeal, no suggestion was made on original submission or rehearing that the Preclusion Clause in anywise affected the case. Tomlin v. State, ____ So. 2d ____ (Cr. App. Ala., Nov. 20, 1979); Appendix "A".

A petition for a writ of certiorari was filed in the Supreme Court of Alabama and automatically granted. No mention of the Preclusion Clause was made in this petition nor its supportive brief. On June 20, 1980, before the Alabama Supreme Court reached any decision in the instant cause, this Honorable Court issued its decision in Beck v. Alabama, (447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]), holding that the Preclusion Clause denied due process in cases where the evidence would support a finding of

lesser included offenses. A little over a month later, on July 31, 1980, the Petitioner filed a motion to reverse his conviction under Beck v. Alabama, above. The key passages of this motion read as follows:

> "4. Petitioner asserts that because the statute under which he was tried is and was unconstitutional his conviction is likewise unconstitutional and due to be reversed and remanded.
>
> 5. Petitioner further asserts that any re-trial of his case may not be had under the present death penalty statute or any death penalty statute to be enacted as such trial would be in violation of the ex post facto clauses of Section 7, Article 1, Constitution of Alabama of 1901, and Article 1, Section 9, Constitution of the United States.
>
> "WHEREFORE, the premises considered, Petitioner respectfully moves that his conviction be reversed, that it be remanded to the Circuit

> Court of Mobile County, and that instruction be given said Court that Petitioner be tried for first degree murder and lesser included offenses and not under any statute for which the penalty is death or life without parole."

This was the first time the Petitioner ever mentioned the Preclusion Clause in this litigation and the first time he ever presented any claim relating to it, but he still made no suggestion that he or his case had been actually prejudiced by the Preclusion Clause.

Subsequently, the Alabama Supreme Court severed the Preclusion Clause from the statute and reformed the sentencing procedures under the statute, which had also been criticized in Beck v. Alabama, above. Beck v. State, 396 So. 2d 645 (S. Ct. Ala., 1980) In addition, following Evans v. Britton, (628 F. 2d 400 [5th Cir., 1980] and 639 F. 2d 221 [5th Cir.,

1980])[2], the Supreme Court of Alabama ruled that all cases tried under the statute prior to Beck v. Alabama, above, (except those involving plea bargains[3]) had to be retried. Ritter v. State, 403 So. 2d 154 (S. Ct. Ala., 1981)[4]

On August 28, 1981, the Alabama Supreme court reversed and remanded the Petitioner's conviction on authority of Ritter v. State, (403 So. 2d 154 [S. Ct. Ala., 1981]). Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Aug. 28, 1981); Appendix "B".

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[2]Reversed, sub. nom. Hopper v. Evans, 456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982)

[3]See Lane v. State, 412 So. 2d 292 (S. Ct. Ala., 1982); Graham v. State, 403 So. 2d 275 (Cr. App. Ala., 1980); cert. quash. 403 So. 2d 286

[4]Vacated sub. nom. Alabama v. Ritter, 457 U.S. 1114, 73 L. Ed. 2d 1326, 102 S. Ct. 2921 (1982); overruled Ritter v. State, 429 So. 2d 928 (S. Ct. Ala., 1983)

Fearing that the Alabama Supreme Court's interpretation might put the statute once again beyond the constitutional pale by authorizing arbitrary verdicts of guilt of lesser included offenses, even where there was no evidence to support them,[5] the State of Alabama applied for rehearing. The State's argument on rehearing was the same it made in response to the Petitioner's July 31, 1980, motion, to wit:

1. The State's evidence proved the charged capital offense to the exclusion of all lesser included offenses.

2. The Defense evidence of an alleged alibi, while a complete defense to the charge if believed by the jury,

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[5]See Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976)

could not reduce the degree of the crime.

3. The Petitioner has never claimed that the Preclusion Clause had any impact on his case.

4. If the Petitioner can suggest any specific, practical way the Preclusion Clause affected his case, he should be heard, but, if he makes no such suggestion, a re-trial is unnecessary and a re-trial to have a new jury consider unsupported lesser included offenses is constitutionally impermissible.

Although he filed several additional briefs in the Alabama Supreme Court, the Petitioner never suggested any specific practical way that the Preclusion Clause affected his case. His claims of prejudice were consistently the sort of general, theoretical and philosophical arguments he makes here.

While the instant case pended on rehearing, this Honorable Court reversed Evans v. Britton (above) and ruled that an Alabama capital convict, who was convicted prior to Beck v. Alabama (above) and who was not prejudiced by the Preclusion Clause, had no right to a new trial. Hopper v. Evans, 456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982) See also Alabama v. Evans, ____ U.S. ____, 75 L. Ed. 2d 921, 103 S. Ct. ____ (1983).

On December 9, 1983, the Alabama Supreme Court granted the State's application for rehearing in this cause. The Court ruled that the Petitioner was not entitled to a new trial, since there was no evidence that would support a finding of lesser included offenses and he had suggested no plausible claim, not contradicted by his own testimony, which entitled him to have the jury consider

lesser included offenses. Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Dec. 9, 1983); Appendix "C". The Alabama Supreme Court declined to decide one of the Petitioner's claims, because it related to sentencing and the Court of Criminal Appeals decision was not final with regard thereto. See Appendix "C", pages 64-65.

STATEMENT OF THE FACTS

I.

SUMMARY OF THE FACTS

The State's evidence at trial showed that on November 25, 1975, Richard Brune accidently killed David Tomlin, the Petitioner's younger brother, in Mobile, Alabama. The Petitioner's family was unable to accept David's death as an accident and became obsessed with the idea of having Bruns prosecuted. On

March 19, 1976, in Houston, Texas, the Petitioner stated his intention of traveling to Mobile, Alabama, for the purpose of killing the person who had shot his brother.

On January 1,1977, the Petitioner arrived in Mobile, Alabama from Houston, Texas, with one Ron Daniels, whom the Petitioner introduced to acquaintances as a "hit man." The Petitioner stated that they had come to Mobile to kill Richard Brune. The next day, the Petitioner and Daniels shot and killed Richard Brune and Brune's date, Cheryl Moore, in cold blood.

The Defense was alibi. The Petitioner testified that he was in Houston, Texas, on January 1-2, 1977.

II.

THE FACTS DETAILED

A.
THE STATE'S CASE

The State's evidence tended to prove the following facts, set out here in chronological order.

On May 30, 1975, the Houston, Texas, Police Department returned to the Petitioner two fire arms which they had seized from his automobile incident to an arrest. The weapons were a 38 cal. Smith and Wesson revolver and a 16 gauge shotgun. (R. pp. 585-586 and 750)

On November 25, 1975, David Tomlin, the Petitioner's younger brother, was shot at his home in Prichard, Alabama, and died. The death was the result of David and his friend, Richard Brune, playfully tussling in a room where a loaded shotgun was leaning against the

wall. When the gun began to fall both boys tried to catch it, Richard by the stock, David by the barrel. In the process, the gun discharged, killing David Tomlin. (R. pp. 461-465)

Initial reaction to the incident was that it was a tragic accident, a position supported by the investigation of the Prichard Police Department. Richard Brune was asked to serve and did serve as a pallbearer for David Tomlin. (R. pp. 231-232 and 464).

However, in the months that followed, Jack Tomlin, father of both David and the Petitioner, apparently became obsessed with a desire to see Richard Brune prosecuted. (R. pp. 464-467)

About four months later, on March 19, 1976, Officer David Hammons of the Texas Department of Public Safety,

operating undercover, entered the Wet and Wild Club, a Houston, Texas, night club, in an effort to purchase drugs from the Petitioner. Covering Officer Hammons was his partner, Officer Eddie Hebison. The officers made no overt contact in the lounge, but Officer Hebison sat with his back to Officer Hammons, so that he could hear most of what was being said. (R. pp. 700-701 and 783-784)

Officer Hammons had arranged to buy some drugs from the Petitioner and tried to arrange a larger purchase of drugs. The Petitioner declined the business saying that he had to go back to Alabama and kill someone, because he had learned that his brother's death was no accident. (R. pp. 701-702 and 7784-785)

Because such talk in the context of drug dealing in nude go-go lounges is so

common and usually empty, the Texas officers paid little attention to it, other than making a note of it. (R. pp. 702-704 and 785-786)

Nine months later, on January 1, 1977, near midnight, the Petitioner and one Ron Daniels[6] arrived at the mobile home in Theodore, Alabama, occupied by the Petitioner's brothers-in-law, Randy and Danny Shanks. The Petitioner told the Shanks that his father, Jack Tomlin, had picked them up in New Orleans, where they had flown from Houston, Texas. The Petitioner told his brothers-in-law that he had come to Mobile to kill Richard Brune and introduced his companion, Ron Daniels, as a "hit man" from Houston. The Petitioner attempted to borrow Danny

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[6]See Alabama v. Daniels, 457 U.S. 1114, 73 L. Ed. 2d 1325, 102 S. Ct. 2920 (1983)

Shank's automobile to use as a get-away car. Danny declined. At the Petitioner's request, the Messers Shanks rented a motel room for the Petitioner and Daniels. In the motel room the Petitioner and Daniels showed the brothers a 38 cal. pistol, a 44 cal. pistol and a 16 gauge shotgun, which they had brought from Houston. (R. pp. 365-384, 414 and 511-515)

The next day, January 2, 1977, about noon, the Petitioner was at the Highway 90 Lounge near Mobile, Alabama. He was driving a light-colored 1968 Ford, which belonged to his sister, Brenda Tomlin Watson. Ron Daniels was with him. The Petitioner talked with both of his brothers-in-law and Herman Stokes. When the Petitioner took Danny Shanks home, the latter observed that the left front tire was low. (R. pp. 325-330, 373-375 and 516-518)

About five hours later, Ricky Harold Pearson noticed a light-colored 1968 Ford, with its motor running and blinker lights burning on the side of a ramp on Interstate 10 in Western Mobile County. There was no one in the car, but the car was pointed west toward Mississippi and Louisiana. Although it was only about five o'clock in the evening it was already dark owing to the weather. Rain and sleet had been falling. (R. pp. 207-209)

A short time later, about five-thirty p.m., Mr. Charles R. Castro and his wife passed the same place. By that time the Ford was gone; in its place was a 1970 Pontiac. The passenger side door was open and someone appeared to be lying beside the car. The Castros reported their discovery to Mr. Harold Davis, a deputy sheriff. Mr. Davis

investigated and found the bodies of Richard Brune, age 19, and Cheryl Moore, age 15. They were dead. (R. pp. 218-220, 223-227, 229-230, and 231-236)

An investigation at the scene showed that the two young people still had their money on their persons. (R. p. 658)

Richard Brune and Cheryl Moore died of numerous wounds inflicted by a .38 cal. pistol, which was probably a Smith and Wesson, and a 16 gauge shotgun. The evidence indicated that the shots were fired from the rear seat. (R. pp. 262-335)

On January 29, 1977, the New Orleans, Louisiana, Police Department located the Petitioner's sister's 1968 Ford in the parking lot of New Orleans International Airport. It had never been reported stolen. (R. pp. 436-443 and 614)

An examination of this vehicle revealed that it had a low left front tire. Although the car was dirty and in disorder, there were no fingerprints inside it. This was unusual and coupled with the presence of a towel in the front seat suggested that the car had been wiped clean. Inside the automobile was found a ticket from an automatic dispenser at the airport parking lot. According to this ticket the 1968 Ford had entered the parking lot on January 2, 1977, at 8:08 p.m. The driving time from the murder scene to New Orleans International Airport is between two and a half to three hours. (R. pp. 443, 446-456, 493-498 and 612-613)

If the car entered the airport parking lot at 8:08 p.m., its occupants were in plenty of time to catch Eastern

Airline's flight 569 from New Orleans to Houston. Its departure time was 8:40 p.m. However, on January 2, 1977, probably because of the bad weather, the flight did not depart until 9:40 p.m. (R. pp. 251-252, 589-591 and 631)

At the time of his arrest in Houston, Ron Daniels had a suitcase attached to which was a baggage check. The baggage check indicated that the suitcase had been checked on Eastern Airline's flight 569, New Orleans to Houston on January 2, 1977. Inside the suitcase were four 16 gauge shotgun shells. (R. pp. 250-252 and 483-487)

At the time of their arrests, both Daniels and the Appellant denied being in Mobile on January 1-2, 1977. (R. pp. 488 and 690)

B.

THE DEFENSE EVIDENCE

The defense was alibi. The Appellant denied that he left the area of Houston, Texas, on January 1-2, 1977. (R. pp. 913-965)

SUMMARY OF THE ARGUMENT

1. Since additional proceedings in the state appellate courts are contemplated, this cause is not final within the meaning of 28 U.S.C. 1257. Odell v. Espinoza, 456 U.S. 430, 72 L. Ed. 2d 237, 102 S. Ct. 1865 (1982). This is especially so since the Petitioner's claims are based on matters relating to sentencing, which may be mooted by the time the state appellate court proceedings are complete.

2. This Petitioner is not the victim of an ex post facto law as the same has been understood for some 200 years. Calder v. Bull, 3 Dal. 386, 3 U.S. 386, 1 L. Ed. 2d 648 (1798) The Petitioner cannot take retroactive advantage of the Beck reformation, because his rights were not abridged by the Preclusion Clause, and he therefore, has no standing to complain about it. McGowan v. Maryland, 366 U.S. 420, 429, 6 L.Ed.2d 393, 401, 81 S. Ct. 1101 (1961); New York v. Ferber, 458 U.S. 747, 73 L.Ed.2d 1113,1129,102 S. Ct. 3348 (1982) The Petitioner's claim of prejudice is that but for the Preclusion Clause, he might have tried the case differently. This is the exact sort of claim of prejudice which this Honorable Court rejected in Hopper v. Evans, (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct.

2049 [1982]) There is no way the evidence in this case could support a conviction for a lesser included offense. The Petitioner has had many opportunities to suggest evidence which he might have of lesser included offenses and to suggest how the Preclusion Clause affected his case. He has made no such suggestions. He simply was not prejudiced by the Preclusion Clause.

3. The Respondent State has consistently insisted that this case is legally indistinguishable from Hopper v. Evans, above. There is no evidence of intoxication or mitigating grief in this record, and the Petitioner has suggested none outside the record. Trial tactics, which would present to the jury lesser included offenses which are not supported by the evidence, are constitutionally

forbidden. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 2049 (1982)

ARGUMENT

I.

SINCE THE LITIGATION IN THE STATE APPELLATE COURTS IS NOT YET COMPLETE, THIS CAUSE IS NOT YET FINAL WITHIN THE MEANING OF 28 U.S.C. 1257

At first glance it might appear that this case is similar to cases like Brady v. Maryland, (373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 [1963]) and Abood v. Detroit Board of Education, (431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 [1977]) for purposes of 28 U.S.C. 1257 finality. However, there are two fundamental distinctions between those and this case. First, the matters at issue in the remandments of those cases were not

fundamental to the claims raised in this Court on certiorari. Second, the remandments in those cases were each a part of an order finally disposing of an appeal.

The Petitioner's claims are based to a great degree on sentencing matters. For example, the Petitioner cites Beck v. State (396 So.2d 645 [S. Ct. Ala., 1980]) and Godfrey v. Georgia (446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 [1980]), apparently for the proposition that he had the constitutional right to have the jury consider the aggravating and mitigating circumstances.[7] (Petition, page 29) Again and again the petition

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[7]Neither Godfrey nor Beck stands for such a proposition. Godfrey concerned the standards which must guide the jury, if they are the sentencing authority. Beck addressed neither federal nor state constitutional issues but legislative intent. The Alabama Supreme Court wrote:

emphasizes the "...sentencing of the defendant [Petitioner] to die by electrocution..." (Petition, page 17. See also pages 8, 22 and 28) The extent

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Footnote 7 continued:

> "...Because the legislature has provided for jury participation in the sentencing scheme, before this jury participation can comport with constitutional requirements, certain procedures must be followed by the trial court...
>
> "The Attorney General recognizes this and wants the jury verdict requirement severed. To sever the jury verdict requirement, in our opinion, would not carry out legislative intent; however, since we conclude that the dominant intent of the legislature was to pass a constitutional death penalty law, we may now construe the requirement that the jury fix the penalty at death to be permissive instead of mandatory. By doing this we carry out legislative intent to pass a constitutional death penalty statute..." (396 So.2d 645; 660; emphasis supplied)

to which the Petitioner relies on jury sentencing and the death penalty is one of several things which is unclear about this petition, but it is clear that he does rely on them. On remandment the Trial Judge might set aside the death penalty. In that event this petition, to the extent that jury sentencing and the death penalty form bases for it, would be mooted.

More significantly, the wording of the order of the Court of Criminal Appeals[8] clearly demonstrates that additional proceedings in this cause are contemplated by that Court. The Petitioner brings this action to review a decision by the Alabama Supreme Court. Yet, the Alabama Supreme Court expressly

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8"...[A]nd that such [corrected and extended sentencing order] be transmitted to this court in answer to the instant remand...." (Appendix "A", page 44)

declined to review sentencing matters until "...after remandment..." (Appendix "C", page 65). Obviously, if the state appellate court proceedings are still under way, this cause is in no sense final. See Odell v. Espinoza, 456 U.S. 430, 72 L. Ed. 2d 237, 102 S. Ct. 1865 (1982). There is simply no way that meaningful review can be undertaken by this Honorable Court, when the very foundations of the Petitioner's claims are in a state of flux. For this reason, if no other, the petition should be denied at this time.

II.

ON THE MERITS

The Petitioner's arguments strike out in so many different directions that it is impossible to present a concise response to them. Therefore, the Respondent State can only address them claim by claim.

A.

ON THE PETITIONER'S FIRST SET OF CLAIMS

The Petitioner somehow works himself around to a claim that he is the victim of an ex post facto law. Frankly, this writer is at a loss to understand this argument. For nearly 200 years the definition of ex post facto law found in Calder v. Ball, (3 Dal. 386, 390, 3 U.S. 386, 390, 1 L. Ed. 2d 648, 650 [1798]) has been accepted, and under that definition this case does not involve an ex post facto law. The Alabama Supreme Court's action in Beck v. State, (396 So. 2d 645 [S.Ct. Ala., 1980]) had nothing whatsoever to do with altering the definition of the crime, aggravating it, changing the punishment nor the evidence required for conviction. The

Petitioner's real complaint is not that he was disadvantaged retroactively but that he was not allowed to take retroactive advantage of the Beck reformation. However this was simply the result of the rule which denies any advantage to those who are not prejudiced by a constitutional defect. McGowan v. Maryland, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961)[9] Before, a person can even complain about a constitutional defect in a statute he must show a violation of his rights. New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)[10]; County

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9"...[T]he general rule is that a 'litigant may only assert his own constitutional rights or immunities...." (366 U.S. 420, 429, 6 L. Ed. 2d 393, 401)

10"...The traditional rule is that person to whom a statute may constitutionally be applied may not challenge that statute on

Court v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979).[11]

The Petitioner claims he was prejudiced by the Preclusion Clause. For nearly four years the State of Alabama has been asking the Petitioner: How were you prejudiced? The answer is always the same as that presented in this petition: But for the Preclusion Clause the

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Footnote 10 continued:

the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court...." (73 L. Ed. 2d 1113, 1129)

11"...A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 US 601, 610, 37 L Ed 2d 830, 93 S Ct 2908 (and cases cited)...." (442 U.S. 140, 154-155, 60 L. Ed. 2d 777, 790)

Petitioner might have acted differently at trial. If the Petitioner had ever stated what he would have done differently, the case might have been re-tried a long time ago.

The Petitioner claims that he could not have foreseen the Beck decisions. Other capital defendants, who were no more clairvoyant than this Petitioner, did present evidence of lesser included offenses. See, for example, Beck v. Alabama, 447 Ala. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). Yet, this Petitioner, even at his sentencing hearing and after the Trial Judge expressly advised him "...We're not sticking to any strict legal rules...[a]nything he wishes to introduce...the Court will listen to..." (R.p. 1005), did not make any reference to lesser included offenses.

The point here is not so much that the Petitioner submitted no evidence of lesser included offenses at his pre-Beck trial but that after Beck he was invited, even urged, to advise the courts of any way he was prejudiced by the Preclusion Clause, and his response was and is: If it had not been for the Preclusion Clause, I might have tried the case differently. Even after Beck, the Petitioner's initial reaction was simply a cynical claim that the invalidated Preclusion Clause voided the whole statute and protected him forever from prosecution for the capital crime of which his guilt is obvious.

The Petitioner's claim that Reed v. State (407 So.2d 162 [S. Ct. Ala., 1981]) inhibited him from introducing evidence of lesser included offenses is, to put it bluntly, nonsense. The Petitioner was

tried on March 20-25, 1979; Reed was handed down June 12, 1981, some two years later! Reed was based on a misapprehension of federal constitutional law (See Ritter v. State, 414 So.2d 452 [S. Ct. Ala., 1982]), which was disapproved by implication in Hopper v. Evans (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]) and superseded Ritter v. State (429 So.2d 928 [S. Ct. Ala., 1983])

The fact of the matter is that, had there never been a Preclusion Clause, the Petitioner would have tried the case just the way he did. If the case were re-tried now, the new trial would be a carbon copy of the first trial, except that the Petitioner would no doubt ask for charges to the jury on lesser included offenses, this Honorable Court's

teachings on the subject[12] to the contrary notwithstanding.

There is simply no way that a long and carefully planned and precisely executed murder of two people can be anything but the capital crime charged in the indictment. If there were a scintilla of evidence of intoxication, passion, insanity or anything else which would reduce the degree of the crime, the Petitioner has had many, many opportunities to present it or, at least suggest its existence to the Courts both before and after the Beck decisions. He has made no effort to do so. It must be concluded, therefore, that such evidence

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12 See Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 1049 (1982)

simply does not exist and never did. Instead, the Petitioner presented an alibi that he was in Houston, Texas at the time of the Mobile, Alabama, killings. If the jury accepted this alibi, they would have had to return a verdict of not guilty. However, no alibi could alter the nature of the killings, whoever did them.

The Petitioner's claims of prejudice are identical to those rejected by this Honorable Court in Hopper v. Evans, (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]). To paraphrase Hopper: The preclusion clause did not prejudice the Petitioner in any way, and a new trial is not warranted. (456 U.S. 605, 613-614, 72 L. Ed. 2d 367, 374-375)

B.

ON THE PETITIONER'S SECOND SET OF CLAIMS

Contrary to what is stated in the petition (page 23), the Respondent State has never conceded or even suggested that this case is distinguishable from Hopper v. Evans (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]). The Respondent State's consistent argument has been that the legal effect of a guilty plea and that of a pure alibi defense are, for the purposes of the Preclusion Clause, identical.

The Petitioner's claim that "...[t]he evidence of record in the case at bar does not conclusively or absolutely negate the possibility that the Petitioner...never intended a double homocide...." (Petition, pages 24-25), indicates that Learned Counsel has

forgotten what the evidence was. The Respondent State, unlike the Petitioner, presents both a summary and a detailed statement of the facts. The evidence taken as a whole and particularly that which shows that the victims were each shot with a pistol and shotgun from the back seat of their car, clearly demonstrates a cold-blooded intentional double homocide. The evidence that the murder of Brune was being planned nine (9) months earlier, the employing of a "hit man", and the carefully planned and executed two-stage trips to and from Mobile all negate the possibility of the crime's being the product of mitigating passion, drunkenness, etc. Even if for some reason the "hit man" somehow managed to shoot both victims with a shotgun and a pistol, the Petitioner was present, and it was his particularized intent that

brought the "hit man" to Mobile in the first place.

The Petitioner claims that there was evidence that he, his deceased brother and the victim, Richard Brune, all abused drugs and alcohol. This statement is, to put it bluntly, false. There was evidence that the Petitioner sold drugs but no evidence that he used drugs or abused alcohol. The evidence, in fact, negates intoxication of any sort on the day of the killing. Not only is there no evidence of the deceased brother's or Brune's using drugs or alcohol but even if there were, it would not have altered the nature of the crime. It is as unlawful to murder a drunk or an addict as it is to murder a minister.

As for the Petitioner's alleged grief, presumably he was upset over his brother's death but this record is devoid

of any evidence of the sort of grief which would mitigate a double murder thirteen (13) months after the event.

The Petitioner does not and has never suggested the existence of any actual evidence of intoxication or passion. He claims that he wants to raise these by trial tactics. However, he has never revealed by what clever tactics he would raise such issues unsupported by the evidence. The only such tactic this writer can imagine would be to ask for charges to the jury on lesser included offenses notwithstanding the lack of evidence. However, allowing the jury to consider lesser included offenses not based on the evidence would violate the Constitution. Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d

974, 96 S. Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 1049 (1982)

The Appellant has never suggested any way in which the Preclusion Clause prejudiced his case; he has never suggested any way the Preclusion Clause affected his rights. Therefore, he has no standing to complain about the Preclusion Clause.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are not final within the meaning of 28 U.S.C. 1257 and are, in any event, correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of _____, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Phillip Wayne Tomlin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

Hon. James E. Atchison
Hon. Richard D. Horne
Hon. William B. Jackson, II
Attorneys at Law
P. O. Box 1706
Mobile, AL 36633

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150